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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROBERT RICHARDSON
PETITIONER

VS.

ALBERTSON'S, INC.
A DELAWARE CORPORATION
RESPONDENT

ON PETITION FOR A WRITE OF CERTIORARI TO

TENTH CIRCUIT COURT

PETITION FOR WRIT OF CERTIORARI

ROBERT RICHARDSON
3545 BIRNAMWOOD DRIVE
COLORADO SPRINGS, CO 80920
(719)282-0568

QUESTION(S) PRESENTED

1. How can the Court of Appeals affirm a Summary Judgment on a statutory right and drop a violation of Title VII and ADA?

2. How can the Court of Appeals affirm a Summary Judgment that, when the genuine issue is the charge that was an action brought against Defendant?

3. How can a company have different rules for its white employees and different rules for its Black employees?

4. How can the Defendant have a three-day rule before a person needs a doctor's note in order to return to work but fires the Plaintiff for taking off one day?

5. How can the Defendant write up the Plaintiff simply for asking for a promotion?

6. How can the Defendant give the Plaintiff a letter of suspension for taking off one sick day when Plaintiff has 248 hours of accumulated sick leave?

7. How can the Court of Appeals affirm a Summary Judgment when the disputed facts are outcome determination under the governing law?

8. How can the Court of Appeals affirm a Summary Judgment when there are no pleadings, depositions, answers to interrogatories, and admissions on file from either Plaintiff or Defendant's witnesses?

9. How can the Court of Appeals and District Court affirm that EEOC can drop an ADA charge?

10. How can the Court of Appeals affirm this order and judgment cited under the terms and conditions of the Tenth Circuit Rule 36.3., when the District Court made a decision under Rule 56[S]?

11. How can the Court of Appeals affirm a Summary Judgment when it did not look at the court records or at the Appellant's brief or evidence?

12. How can the Court of Appeals affirm appellee did not shift the burden of evidence under Rule 301(8)(9)(10)(11)(12)?

13. How can a person use his sick leave that has been earned? How can a person use his accumulated sick hours under a Union contract, and what is a bona fide illness or sick leave?

14. How can the Courts affirm a Summary Judgment on a genuine issue, when it is not between the Plaintiff and the Defendant but others?

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5. Ehrenhaus vs. Reynolds cited as 963F 2d 916 (10th cir 1992)	917, 912
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7. Freddie J. Mitchell vs. Johnny Inman et. al. cited as 682F 2d 886 (1982)	886-888
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10. Oneeker vs. Rizley cited as 324F 2d (269) 1963	269-271
11. Deltona Corporation vs. Clifford L. Alexander cited as 682F 2d 888 (1982)	888, 889
12. Meade vs. Grubbs cited as 841F d1512 (10th cir 1988)	1514, 1518, 1520, 1526, 1529, 1530
13. McDonnell Douglas Corp. vs. Green cited as 411 US 792, 362Ed 2d668, 93 S Ct 1817	668-680
14. Vincent L. Pryner vs. Tractor Supply Company Inc. cited as 927F. Supp. 1140	1140-1148
15. Rotas vs. Waterman Broadcasting cited as 927 F Supp 1547 (M.D. Fla 1996)	1547-1554

STATUTES AND RULES

Rule 56[S]
Rule 301
Rule 37, 73, 72
Rule 26, 36, 33
Bakery Agreement between Albertson's Inc. and Bakery, Confectionery & Tobacco Worker's International Union Local #26, Denver, Colorado, Article 12 and 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PETITION FOR WRITE OF CERTIORARI

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

The date on which the United States Court of Appeals decided my case was July 29, 1996. A timely petition for rehearing was denied by the United States Court of Appeals on September 16, 1996, and a copy of the order denying rehearing appears at Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. S 706(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C S2000E-5(f) 28 U.S.C.

2. 5706 (f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 E-5(f) 28 U.S.C. S 1991(c).

3. Rule 56[S]

4. Rule 301

5. Rule 26, 33, 36, 37, 73, and 72

STATEMENT OF THE CASE

Plaintiff is a Black male citizen of the State of Colorado and resides in El Paso County. Defendant hired him on or about November 21, 1984 into a full-time position as a baker. During the course of his employment, Plaintiff was continually being "written up" by his white supervisor for conduct that did not attract such measures when engaged in by white co-workers, who were not written up or suspended.

Plaintiff suffers from asthma and from time to time Plaintiff has experienced an asthma attack at work, at least in part because of the flour dust in the air, which in general caused a shortness of breath. On or about June 2, 1992, Plaintiff left his work place during his lunch hour and did not return because of an asthma attack. He called in to inform the bakery manager that he would not be returning that day. The next day, Plaintiff's wife called in to inform Defendant that Plaintiff was still too ill to return to work. When Plaintiff attempted to return on or about June 5, 1992, Defendant prevented him from doing so because he failed to produce a physician's statement verifying his illness. At this time, Plaintiff had accrued 248 hours of sick leave. Company policies allowed a person a three-day grace period before he/she needed a physician's statement. Under the same policies, Defendant refused to honor the Union Bargaining Contract and refused to arbitrate the grievance filed by Plaintiff with the Union after his termination. However, Defendant has made it a practice to arbitrate all grievances presented by white employees.

The Plaintiff was terminated when he took off a sick day. however, when a white employee took off a sick day, the white employee was not terminated. Defendant appears to have a policy in which a white employee needs a physician's statement after three sick days while the Black employee needs a physician's statement after only one sick day. Plaintiff was placed on suspension and then terminated. When a white co-worker was in a similar situation, he/she was not disciplined as harshly as the Black Plaintiff.

Plaintiff's complaint states two claims — race and color discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. s 200e. et sez. and 42 U.S.C. s 1981, and disability discrimination, in violation of Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111-12117.

REASONS FOR GRANTING THE PETITION

This petition must be granted because the lower court did not prove whether or not the Defendant met all the requirements under Federal Rules of Civil Process (Rule 56[S]) to be granted a Summary Judgment. When the Court of Appeals Tenth Circuit affirmed the lower court order and judgment, it came in conflict with (1) (Rule 56[S] and Celotex Corp. vs Catrett 477 US 317, 912 Ed 2d 265, 106 S Ct 2548) Defendant did not do a full discovery. The lower court did not have all the pleadings, depositions, answers to interrogatories, witness' testimony, and admissions from either the Defendant or the Plaintiff. (2) (St. Mary's Honor Center et al. vs Melium Hicks) The court did not look at the letter of suspension dated June 25, 1992 or the letter from EEOC dated October 22, 1993. The Court of Appeals did not use the Rule of Evidence in this case. The lower court also did not use the Rule of Evidence in the case of St. Mary Honor Center vs Hicks. (3) The Court of Appeals affirmed this case came in conflict with Pryner vs Tractor Supply Co. [cited as 927 F Supp. 1140 (S.D. Ind 1996)]. Concerning statutory rights and other constitutional rights, Plaintiff did not give up his constitutional right when he filed a complaint with the EEOC.

CONCLUSION

Defendant's Motion for a Summary Judgment must be reversed by this court. The Court of Appeals and the lower court have not looked at the governing law concerning a Summary Judgment or the Rule of Evidence in a discrimination case. The Plaintiff only took off one

sick day while having accumulated 248 hours sick leave, whereas a white co-worker who took off one sick day was not discharged.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert L. Richardson

Robert L. Richardson

Date: 20 Jan 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
Filed 7/29/96
TENTH CIRCUIT

ROBERT RICHARDSON, Plaintiff-Appellant, v. ALBERTSON'S, INC., a Delaware Corporation, Defendant-Appellee.	No. 96-1036 (D.C. No. 94-B-1774) (D. Colorado)

ORDER AND JUDGMENT[1]

Before **BRORBY, EBEL** and **HENRY, Circuit Judges.**

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9.

---

[1] This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, the order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

The case is therefore ordered submitted without oral argument.

Appearing pro se, Robert Richardson appeals the district court's order granting Albertson's motion for summary judgment on his claims that Albertson's termination of his employment violated the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981. We affirm.

Albertson's terminated Mr. Richardson from his position as a baker on August 7, 1993. Mr. Richardson, an African American, claims he was fired for being absent from work for two days without having a doctor's note for verification while white employees were not required to produce doctor's notes for similar absences. Albertson's claims they fired Mr. Richardson "for failing to report to work as scheduled, failing to comply with a reasonable request that he provide documentation concerning his absence, and because of Albertson's belief that he lied about the events of June 2-5, 1992, asked a co-worker to lie for him, and falsely denied reporting to work."

Prior to filing his complaint in district court, Mr. Richardson was required to exhaust his administrative remedies regarding his claims under the Americans with Disabilities Act and Title VII. 42 U.S.C. §2000e-5; 42 U.S.C. § 12117(a); *Khader v. Aspin*, 1 F.3d 968, 970 (10th Cir. 1993). He attempted to do this by filing a claim with the Equal Employment Opportunity Commission (the "Commission"). In its determination letter, the Commission found "Charging party has failed to provide, medical documentation to show that he is a qualified individual as required by the ADA. Therefore, the Commission finds that it has no jurisdiction on the allegations filed under the Americans with Disabilities

Act." We have held that "when a complainant refuses or fails to provide the agency information sufficient to evaluate the merits of the claim, he or she cannot be deemed to have exhausted administrative remedies." *Khader*, 1 F.3d at 971 (internal quotation marks omitted). We therefore agree with the district court's finding that it lacked jurisdiction over Mr. Richardson's claim under the Americans with Disabilities Act because by failing to provide the Commission with the documents it needed to determine his claim, he failed to adequately exhaust his administrative remedies.

The Commission's letter did dismiss Mr. Richardson's Title VII claims on the merits. We agree with the district court that he failed to show any evidence of racial discrimination and his Title VII claim and his § 1981 claim were properly dismissed on summary judgment. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 186-87 (1989) (same analysis applies to Title VII and § 1981 claims). Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), an employee carries the initial burden of establishing a prima facie case of racial discrimination. If this is done, the burden then shifts to the employer to show a legitimate, non-discriminatory reason for terminating the plaintiff. *Id.* If the employer does so, the burden then shifts back to the plaintiff to establish the employer's reasons as pretext. *Id.* at 804; *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995). The district court found:

> Assuming that Richardson can set forth a prima facie case of racial discrimination, Albertson's has met its burden of setting forth a legitimate non-discriminatory reason for terminating him. Albertson's proffers affidavits of four employees who confirm the events of June 2 through 5. These facts are uncontroverted based on Richardson's failure to provide evidence other

> than his own conclusory allegations regarding these events. Therefore, Richardson presents no evidence that the proffered reasons for his termination were pretextual. Accordingly he fails to set forth a prima facie case of racial discrimination and Albertson's is entitled to summary judgment on Richardson's Title VII and § 1981 claims.

After liberally construing the record, the only evidence we can find that Mr. Richardson offers of race discrimination are his unsupported allegations white coworkers were not fired for failing to report to work and his statement that he has shown "his witness and produce[d] evidence to show a genuine issue in his pretrial disclosures." He fails to identify who this witness is or what their testimony would be; nor does he identify any non-minority coworkers who were treated differently than he was. He also fails to provide any evidence to dispute the legitimate reasons Albertson's gave for terminating him. Mere conclusory allegations unsupported by any evidence are not enough to withstand a motion for summary judgment.

The order of the district court is **AFFIRMED**.

Entered for the Court:

WADE BRORBY
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action 94-B-1774

ROBERT RICHARDSON,

Plaintiff,

v.

ALBERTSON'S, INC., a Delaware corporation,

Defendant.

ORDER

Defendant Albertson's Inc. (Albertson's) moves for summary judgment on plaintiff Robert Richardson's (Richardson) complaint. Richardson alleges that Albertson's termination of his employment violated the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq., Title VII of the Civil Rights act of 1964, as amended (Title VII), 42 U.S.C. § 2000e et. seq., and 42 U.S.C. § 1981. The motion is fully briefed and oral argument will not materially aid its resolution. For the reasons set forth in this order, I grant the motion for summary judgment on all claims.

I.

The following facts are not genuinely disputed based on Richardson's failure to provide evidence other than his own conclusory allegations in support of his version of the events of June 2 through 5. Richardson is an African-American male who was employed by Albertson's as a baker in Colorado Springs, Colorado. On June 2, 1992, Richardson left the store for his lunch break. During the break, he telephoned his Bakery Manager, Jacqueline Johnson, and told her he would be late returning to work because he had a flat tire. Hildebrand Aff. ¶ 4; Johnson Aff. ¶¶ 3-5. During Richardson's absence, two police officers from the El Paso County Sheriff's Office came to the store with a warrant for Richardson's arrest. The store director, Pat Hildebrand, told the officers that Richardson was at lunch but would be returning. Hildebrand Aff. ¶¶ 5-6. The officers and William Winters, a co-worker of Richardson's, were at the store's entrance when Richardson drove into the parking lot. When he saw the officers, Richardson drove off and did not return to work that day. Winters Aff. ¶ 3.

On June 3, 1992, Richardson called in sick. He did not state what the nature of his illness was. On June 4, 1992, Richardson arrived for work at approximately 2:00 a.m. Before punching in he saw Winters who questioned him regarding the events of June 2, 1994. Richardson admitted to Winters that he left the store because the police officers wanted him for failure to appear. Winters Aff., ¶ 4. Richardson then left the store. He asked Winters to lie if anyone asked him whether he had seen Richardson. Russell Weiant, Karl Quintana, and Weston Pauling all verified that Richardson was at work the morning of June 4. Hildebrand Aff. ¶ 11.

On June 5, 1992, Richardson called Hildebrand stating that he was ill on June 3 and 4 and had gone to the doctor

on June 4. Hildebrand requested Richardson to bring in verification of his office visit. Richardson failed to produce this documentation. When questioned, Richardson denied that he had been at work on June 4. Hildebrand then suspended Richardson pending investigation. Hildebrand Aff. ¶ 13.

On June 25, 1992, Michael Schwarzkopf, Albertson's regional director, sent Richardson a letter setting forth the events of June 2-5. Schwarzkopf requested that Richardson respond with any and all documentation that he had disproving the facts as known to Albertson's. Schwarzkopf also requested that Richardson provide a written statement documenting the events of June 2-5. A decision regarding Richardson's employment would be made by July 15, 1992. Schwarzkopf Aff. ¶ 4.

On July 15, 1992, Richardson responded to the letter with a one-page, hand-written note and a copy of page 9 of the labor contract between Albertson's and the Union. The letter and documentation was not responsive to Schwarzkopf's requests. Because Albertson's had no evidence supporting Richardson's version of the events of June 2-5, Richardson was terminated effective July 15, 1992. Schwarzkopf Aff. ¶¶ 5-7.

Richardson subsequently filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging racial discrimination and disability discrimination. Richardson received two letters from the EEOC requesting information verifying his disability including all documentation from his physician and a description of any accommodation requested. Defendant's Brief, Exh. M. Richardson failed to provide the EEOC with any documentation. Plaintiff's Brief, Exh. G. A determination letter was executed April 21, 1994. The letter stated that due to Richardson's failure to provide documentation showing that he is a qualified individual as required by the ADA, the EEOC lacked jurisdiction over

this claim. The letter further stated that after reviewing Richardson's claim it was determined that "the evidence obtained during the investigation does not establish a violation of the statutes." Plaintiff's Brief, Exh. G. p.2. Richardson was informed that "THE CHARGING PARTY MAY ONLY PURSUE THE TITLE VII CLAIM BY FILING SUIT AGAINST THE RESPONDENT NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF RECEIPT OF THIS LETTER. Otherwise, the Charging Party's right to sue will be lost." Id. On July 29, 1994, Richardson filed this action alleging that Albertson's violated Title VII, the ADA, and § 1981.

II.

Fed.R.Civ.P.56 provides the summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c). The non-moving party has the burden of showing that there are issues of material fact to be determined. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine issues for trial. *Celotex*, 477 U.S. at 323; *Mares v. Conagra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992).

Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing the existence of a genuine factual issue to be

tried. *Ottenson v. U.S.*, 622 F.2d 516, 519 (10th Cir. 1980); Fed. R. Civ. P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the pleadings themselves." *Celotex*, 477 U.S. at 324. If a movant establishes entitlement to judgment as a matter of law given uncontroverted, operative facts contained in the documentary evidence, summary judgment will lie. *Mares*, 971 F.2d at 494.

III.

Before bringing a claim in federal court under Title I of the ADA or Title VII, the charging party must exhaust his administrative remedies. 42 U.S.C. § 2000e-5; 42 U.S.C. § 12117(a); *Wade v. Secretary of Army*, 796 F.2d 1369, 1377 (11th Cir. 1986); *Olds v. Alamo Group (KS), Inc.*, 889 F. Supp. 447, 449 (D. Kan. 1995) (Title I of the ADA incorporates the remedies and procedures of Title VII). If an employee refuses or fails to provide sufficient information so that the agency can evaluate the merits of the claim, he "cannot be deemed to have exhausted administrative remedies." *Wade*, 796 ^F.2d at 1376.

As part of the EEOC investigation, the EEOC requested Richardson provide to it all documentation related to his disability. The determination letter of April 21, 1994, states that Richardson failed to provide any documentation upon which the EEOC could determine whether he was a qualified individual under the ADA. As a result, the EEOC lacked jurisdiction over Richardson's ADA claim based on his failure to cooperate. Thus, Richardson failed to exhaust his administrative remedies with regard to his ADA claim which deprives this court of jurisdiction. *Bridges v. Diesel Serv., Inc.*, 3 A.D. Cases 914, 915 (E.D. Pa. 1994). Moreover, this court lacks jurisdiction over the alleged ADA claim because the events giving rise to the claim occurred before July 26, 1992, the

effective date of the ADA. *O'Bryant v. City of Midland*, 9 F.3d 421 (5th Cir. 1993); *Smith v. United Parcel Service of America Inc.*, 65 F.3d 266, 268 (2d Cir. 1995). Consequently, I grant the motion for summary judgment on Richardson's ADA claim.

Albertson's also argues that Richardson's Title VII and ADA claims must be dismissed because he failed to file his action within 90 days of receipt of the Notice of Right to Sue. I agree. The determination letter was mailed on April 21, 1992. Pursuant to Fed.R.Civ.P.6(e), three days is added onto the prescribed period for mailing. *Baldwin Co. v. Welcome Center*, 466 U.S. 147, 148 (1984). Richardson filed his complaint on July 29, 1994 outside of the allotted ninety-three day period. Therefore, Richardson's Title VII and ADA claims must be dismissed for failure to comply with the procedural requirements.

Moreover, Albertson's argues that even if Richardson's claims were timely filed, he cannot establish a prima facie case of racial discrimination under Title VII or § 1981. To prevail on a claim of racial discrimination under Title VII, a plaintiff must prove, either directly or indirectly, that his race was a motivating factor for the employment action of which he complains. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Supreme Court in *McDonnell Douglas* established the burdens of proof in a Title VII action. First plaintiff must establish by a preponderance of the evidence a prima facie case of racial discrimination. The burden then shifts to the defendant to prove legitimate non-discriminatory reasons for denying the individual employment. If the defendant meets its burden, the plaintiff must be given an opportunity to establish that the defendant's purported reasons for denying employment are a mere pretext. *Id.* The same analysis is applicable to a § 1981 claim. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186-87 (1989).

To set forth a prima facie case of racial discrimination Richardson must prove that: (1) he belongs to a class protected under Title VII; (2) he was qualified for the position of baker; (3) he was terminated; and (4) the position was filled by a white individual. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). Assuming that Richardson can set forth a prima facie case of racial discrimination, Albertson's has met its burden of setting forth a legitimate non-discriminatory reason for terminating him. Albertson's proffers affidavits of four employees who confirm the events of June 2 through 5. These facts are uncontroverted based on Richardson's failure to provide evidence other than his own conclusory allegations regarding these events. Therefore, Richardson presents no evidence that the proffered reasons for his termination were pretextual. Accordingly, he fails to set forth a prima facie case of racial discrimination and Albertson's is entitled to summary judgment on Richardson's Title VII and § 1981 claims.

Accordingly it is ORDERED that:

The defendant's motion for summary judgment on all claims is GRANTED, judgment to enter for defendant Albertson's against plaintiff Richardson on all claims with costs awarded to defendant.

Dated: January 12, 1996 in Denver, Colorado.

BY THE COURT:

S/

LEWIS T. BABCOCK, JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT RICHARDSON,

Plaintiff - Appellant,

v. No. 96-1036

ALBERTSON'S, INC.
a Delaware corporation,

Defendant - Appellee.

ORDER
Entered September 16, 1996

Before BRORBY, EBEL, and HENRY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk

By S\
Deputy Clerk

APPENDIX D

ALBERTSON'S

June 25, 1992

Mr. Robert L. Richardson
2380 Vintage Drive
Colorado Springs, CO 80920

Dear Mr. Richardson:

It has come to my attention that you are on indefinite suspension from your job at Store #858 in Colorado Springs due to events that transpired earlier this month. Specifically, I understand that on June 2 you never came back to finish the remainder of your shift after you went to lunch that day. Many eye witnesses observed that as you were driving through the parking lot to park so that you could return and finish your shift, you observed the Store Director and others, including the police, waiting for your return. The police had a warrant for your arrest. When you saw them, you sped up and drove off, never to call or return that day. When you were interviewed by the Store Director the next day, you told him that you had felt sick and had gone home.

The next day, June 3, you called in sick.

On June 5, while being interviewed by the Store Director again, you claimed that you had missed your June 4 shift as well because you had gone to a doctor over what you

claimed was your asthma problem. You indicated that three years ago you had gone to a doctor for the very same problem and that you might have to wear a dust mask or find another job because of the effect the flour was having on you. When the Store Director asked you, you had no bill or prescription or any other kind of verification of either the medical problem or that you had actually been to a doctor due to your claimed illnesses on June 2, 3 and 4. The Store Director specifically asked you on two occasions during that interview whether you had been in to work on June 4 at any time. To both occasions, you answered that you had not been.

We have learned, however, that at about 2:00 a.m. on June 4 (the start of your shift) you appeared at the store ready to work. We have learned that a number of employees saw you and that at least one of them spoke to you about your problems with the police. When that individual persisted in questioning you about the issue, you told him that you had something else you needed to do and that you weren't going to work. (You specifically told him not to tell anyone that you had been in and to lie for you.) You then left the store.

As you know, Albertson's has had a great deal of difficulty with your work performance for a number of years. We feel as if our company and the various supervisors you have worked for have done everything in their power to make you an acceptable employee. I personally know of no other individual who has ever worked for our company who has been given anything close to the number of opportunities you have been given. Because of this history of failings, and because we suspect that you have most recently falsified the reasons for your absenteeisms (and have in fact asked a fellow employee to lie for you to cover them up), we are about to make a

decision about whether you will be employed with Albertson's in the future.

Therefore, and in fairness to you, we respectfully request that you provide any and all documentation you may have or may be able to obtain that would tend to indicate that the things I have set forth above are not true. This would include your providing a written statement seeking to clear up what appears to us has happened. We intend to make a decision about these matters no later than July 15, 1992, unless you tell us that there is some document or thing you have not been able to obtain or complete by that time (and you give us a time when we may reasonably expect the additional information).

If you have a question about any of this, please feel free to give me a call. My number is area 208-385-6477.

Thank you for your attention to this.

Sincerely,

S\
Michael B. Schwarzkopf
Regional Director, Labor Relations
Labor Relations Department

MBS:mma

cc: Joe Maestas - BC&TW Local #26
Karen Freckleton - Albertson's Labor Relations
Pat Hildebrand - Albertson's Store #858
Bob Schiefelbein - Albertson's #3800 Division

APPENDIX D

ALBERTSON'S

July 14, 1992

Mr. Robert L. Richardson
3066 Meander
Colorado Springs, CO 80906

Dear Mr. Richardson:

On June 25, 1992, we sent a Certified letter to you at 2380 Vintage Drive in Colorado Springs. (This address appeared on National Labor Relations Board correspondence.) As of this date, we have not been notified by the Post Office that you have picked up this letter. We therefore are attempting to reach you by other means.

I have enclosed a copy of the June 25, 1992 letter to you in which we requested you provide any and all documentation you may have or may be able to obtain that would tend to indicate that the things we set forth in that letter were not true. We are requesting you provide a written statement seeking to clear up what appears to us has happened. We intend to make a decision about these matters no later than August 7, 1992 unless you tell us that there is some document or thing you have not been able to obtain or complete by that time (and you give us

a time when we may reasonably expect the additional information).

If you have a question about any of this, please feel free to give me a call. My number is 208-335-6384.

Thank you for your attention to this.

Sincerely,

S\
Karen S. Freckleton
Contract Administrator
Labor Relations Department

KSF:mma

cc: Joe Maestas, BC&TW Local #26

Enc.

APPENDIX E

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Denver District Office

October 22, 1993

Robert L. Richardson
2820 Woodland Hill Drive
Colorado Springs, CO 80920

Re: Richardson vs. Albertson's
Charge No. 320931528

Dear Mr. Richardson:

Reference your office visit on October 7, 1993, you brought in some documentation dated November 23, 1986, regarding your problems with shortness of breath. I am unable to ascertain that from the documentation that you have provided to me that you a qualified individual under the Americans with Disabilities Act.

I would like to have further evidence from your physician or medical treatment that can identify a history of your claimed disability.

Please forward the following information by November 13, 1993.

1. Provide copies of any medical bills, insurance claims, Doctor visits dates and treatment you have received regarding your disability.

2. Specifically, on June 3, and June 4, 1992, (The dates of which your employer terminated you) you stated that you had been sick and had to go to the Doctor. PLEASE PROVIDE ANY BILLS, HOSPITAL TREATMENT STATEMENTS, INSURANCE CLAIMS REGARDING THESE DATES!!!!

3. Was there an arrest warrant out for your arrest on those dates?

4. Please provide any information regarding your employer's failure/refusal to accommodate your disability. Did you ask for accommodation? If so, when (date) and to whom did you submit your request.

If we do not hear from you regarding the above request information within 33 days, by November 24, 1993, we will dismiss your charge.

Please call me at (303)866-1353, Monday thru Friday, 7:00 am to 3:30 pm.

Sincerely,

S\
Frank S. Feldman
Investigator

FSF:lj

APPENDIX F

NEW PATIENT EVALUATION

PATIENT: RICHARDSON, ROBERT
DATE: 9-10-90

HISTORY OF PRESENT ILLNESS: Mr. Richardson is a 40-year-old male who presents for evaluation of shortness of breath, dyspnea on exertion, and wheezing, with some cough producing white phlegm. He has had this on and off for the last three years. In fact, about three years ago he had an episode so bad that he was put in the hospital after having presented to the E.R. with these symptoms. Apparently, he experienced an allergic reaction to epinephrine.

He currently takes no medications for this apparent asthmatic condition and he presents now for evaluation because it has recurred and is more bothersome to him than before.

SOCIAL AND FAMILY HISTORY: Negative. He is allergic to no medicines and is a nonsmoker.

He takes no medicines currently on a regular basis.

PAST HISTORY: Medical and surgical history is negative except for the asthmatic episode approximately three years ago, as outlined above.

The patient works as a baker and is not exposed to any unusual toxins in his profession. One significant exposure is to multiple chemical agents, including agent orange in Viet Nam in the 1970s.

GENERAL REVIEW OF SYSTEMS: Other than as outlined above, notable only for occasional low back pain which is probably secondary to musculoskeletal strain from his profession.

PHYSICAL EXAMINATION: BP 110/80. Saturation on room air was 93% with an 85 heart rate. Head normocephalic, atraumatic. Neck supple without node or mass. Chest clear. Heart regular without murmurs or gallops, lifts, thrusts, or heaves. abdomen soft; bowel sounds present without masses or organomegaly. Extremities - no edema. Gross neurologic for mental status, motor and sensory was physiologic.

IMPRESSION: 1. Cough with bronchospasm. This is probably an allergic or asthmatic phenomenon, although he does give a history to support esophageal acid reflux. He does not give a history for heart failure nor does he give a history to support sinusitis.

PLAN: Obtain complete pulmonary function tests, upper GI and barium swallow and CBC. A sample of Ventolin metered dose inhaler was given as well as a prescription. I have asked him to follow-up in about 3-4 weeks after he has had a chance to try the Ventolin and obtain the studies outlined above. I suspect we will find asthma on the pulmonary function tests and we will be able to continue the inhaler and perhaps start an oral medication if necessary. NOTE: The chest x-ray that he brings with him is negative.

S. KENT OLVEY, M.D.

SKO:pm

PULMONARY ASSOCIATES

RICHARDSON, ROBERT 10-1-90

Mr. Richardson comes in today for follow-up of his bronchospasm and cough. With the Ventolin metered dose inhaler he has done much better. Studies done at Penrose since last visit are notable for pulmonary functions with small airway obstruction which improves with bronchodilator by 17% in the $FEV_{25/75}$ category. His CBC, chest x-ray, upper GI, and barium swallow were normal.

On exam today, blood pressure 117/70. Chest clear. Heart regular without murmurs or gallops, lifts, thrusts, or heaves. Extremities - no clubbing, cyanosis, or edema.

PLAN: Continue the Ventolin metered dose inhaler. We discussed this at length. No return visit was given. He can return p.r.n.

S. KENT OLVEY, M.D./pm